

FILED
JAN 16 1920

JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 150.

B. C. LEE, PETITIONER,

vs.

CENTRAL OF GEORGIA RAILWAY COMPANY ET AL.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE
STATE OF GEORGIA.**

**SUPPLEMENTAL BRIEF OF COUNSEL FOR
PETITIONER.**

To inform the Court as to certain statements and conclusions contained in the respondents' brief, we think it appropriate to reply thereto.

On page 7 of their brief, respondents' counsel, quoting section 4512, Code of Georgia, said: "The plaintiff bases his claim to a joint right of action and to a joint judgment against the railroad company and O'Donnell, its engineer, on the Georgia statute."

This is a wholly inaccurate statement, so far as the claim to a joint right of action is concerned. Petitioner did not de-

rive his right to sue the respondents from this statute. This statute does not create such a right. Its purpose and scope is simply, in the first sentence, to declare the common law, and, in the second, to soften the rigor of the common law by permitting the jury to make an apportionment of damages. It recognizes the right to sue jointly, but does not create it. This right was derived by the adoption by the Georgia courts of the common-law rule that all wrongdoers may be sued in one action, that the injured party may sue them separately or collectively, as he may elect. This rule was announced by the Georgia courts in the early case of *Brooks vs. Ashburn*, 9th Georgia, 228 (3), long before the code was adopted, and has existed unimpaired ever since, as will be seen from the cases cited on page 10 of our original brief, and the case of *Central Railroad vs. Harden*, 18th Georgia Appeals, 392.

We challenge the assertion made on page 19 of counsel's brief that the record does not bear out the statements made, that the complaint of misjoinder was not made as to the count of the petition brought under the State liability act.

It is true that each demurrer does make the general ground that there is a misjoinder of parties. This, under our practice, would not raise the question, because it is necessary, we think, to point out the respect in which the misjoinder is made and of what it consists. However, note the amendments to the demurrer, pages 44-5 of the record, where, alone, the first count is excepted to. Note that the answers, pages 7 and 8 of the record, answer both counts. Note further, that the amendments to the answer, pages 9, 10 and 11 of the record, in which is set up the defense of misjoinder, sets it up to the first count alone. There was no abandonment of the second count up to this time. The Court passed upon each ground of demurrer to both counts. (See p. 47 of the record.) It was only at the filing of the amended answer, long after the demurrers were overruled, that the defendants admitted they were engaged in interstate commerce, and it

was only upon the trial of the case that the second count was abandoned.

We submit that this record justifies our assertion that had the parties being engaged in intrastate commerce the petitioner's right to sue jointly would not have been challenged.

Cases cited by respondents' counsel as authority for holding that defendants cannot be joined in one action, where liability of one arises under the common law and the other arises under a statute, do not bear out the respondents' position. Counsel cite *Thompson vs. C. & O. Ry.*, 176 S. W., 1006. An examination of this case and the cases of *South Covington vs. Finans*, 155 S. W., 742, and *L. & N. R. R. vs. Strange*, 161 S. W., 239, shows that the *Thompson* case was based upon a local rule in Kentucky to the effect that causes of action in the courts of Kentucky cannot be joined where one cause arises by statute and the other from the common law.

The case of *Kelly vs. C. & O. Ry.* was simply the case of a Federal court sitting in Kentucky following the local practice, except that the question of separable controversy was alone involved.

This case is entirely out of harmony with *Southern Ry. vs. Miller*, 217 U. S., 209, where it was held that no separable controversy existed, though the cause of action against the individual defendants arose by common law and the liability of the railroad company by statute.

The textbook authorities cited are based upon these cases. Consequently, their only value is to expound the local practice of the State of Kentucky.

The case of *Taylor vs. Southern Ry.*, 178 Federal, 380-1, besides being poorly considered, as it was exactly contrary to the *Pederson* case, wherein it was held by this Court that an employee engaged in the repair of a railroad bed used for interstate traffic was engaged in interstate commerce, involved only the issue of separable controversy and not the

issue of misjoinder, and the Court held that there was no separable controversy in that case.

It is stated on page 24 of respondents' brief that while it is conceded that the Georgia courts in common with other courts have often upheld the joint right of action against tort-feasors it is denied that the Supreme Court of the State has ever held that the employee may join the master and co-employees as defendants where injuries arose under either the Federal or State employers' liability acts. It is true that the Supreme Court has not passed expressly upon such a case since the present act was passed. Such cases have been before it, but the case at bar is, so far as the published reports show, the only one in which the point has ever been made. The cases of *Washington vs. Atlantic Coast Line R. R.*, 135 Georgia, 638; *Chandler vs. Atlantic Coast Line R. R.*, decided and reported together, were such cases. In each case the employee was injured in intrastate commerce governed by the present employers' liability act. The master and servant were joined as defendants in the same suit. The cases were litigated to a conclusion. In the *Washington* case no point as to the right of joinder was made. We cannot state for a fact, but we are quite sure, that in the *Chandler* case the point was made and decided adversely to the respondents by the Court of Appeals to whom the case was returned after the Supreme Court passed upon the constitutionality of the question. The opinion of the Court of Appeals is published in the 11th Georgia Appeals, but the facts are not set out, so we cannot with confidence state that the question was involved in this.

But we submit the case has been often passed upon and by our appellate courts in connection with railroad liability act in effect prior to the enactment of the present act of 1899. We will, for example, take the *Miller* case, 1 Georgia Appeals 616. First, for the reason that counsel state on page 25 of his brief that it would have been differently decided if the Federal law had been in existence at the time and the action

against the defendants had been founded thereon. Second because the Supreme Court of Georgia in deciding a similar question in *L. & N. R. R. Co. vs. Roberts*, 136 Georgia, 270 made the Miller case its decision by following it as an authority, and because this Court, 217 U. S., 209, affirmed it.

What was the law of Georgia at the time of the occurrence upon which it was based?

It was contained in sections 2320, 2321 and 2323 of the code of 1895, respectively, as follows:

"Injury to Person or Property.—In all cases where the person or property of an individual may be injured, or such property destroyed, by the carelessness, negligence, or improper conduct of any railroad company, or officer, agent, or employee of such company, in or by the running of the cars or engines of the same, such company shall be liable to pay damages for the same to any one whose property or person may be so injured or destroyed, notwithstanding any by-laws, rules, or regulations, or notice which may be made, passed, or given by such company, limiting its liability.

"(Sec. 2321.) Damages by Running of Cars, etc.—A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

"(Sec. 2323.)—If a person injured is himself an employee of the company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

These sections were codified from the Georgia Acts of 1855-6, page 155. This was an employers' liability act to all intents and purposes just as much as the act of 1909.

contained in the present code section copied in the appendix on page 38 of our brief.

These statutes form a complete employers' liability act so far as persons injured by the running of trains is concerned. The company is made liable for the negligent acts of servants and agents. The presumption of negligence was created and the fellow-servant law was abolished. The Federal act of 1908 and the State act of 1909 went no further, except that they applied to employees other than those engaged in the operation of trains.

Under these conditions we insist that the impartial mind must consider that there is no justification for the statement that the Miller case would have been decided differently if the fellow-servant acts had been enacted previous to the occurrence which brought about the Miller case. The seeming difficulties of application which present themselves now presented themselves then. Against the servant defendant no presumption of negligence arose, but plaintiff had to prove negligence. In his favor, however, he could set up the defence of comparative negligence and to have his damages reduced. Against the railroad company defendant a presumption of negligence arose upon proof that plaintiff was without fault, but it could not have any diminution of damages by reason of the concurrent negligence of the plaintiff. These considerations which were merely defensive matters were not so difficult as to prevent the plaintiff from exercising his common-law right to sue both master and servant in the same action. Why should they prevent him now? No rational reason can be given.

We submit that the contention that a decision which declares that a plaintiff may join two defendants in the same action when the liability of one arises by statute and the other under the common law does not in principle govern and control the case of a statute simply because it is called an employers' liability act, is wholly without merit.

In criticising the Miller case, 217 U. S., 209, page 25 of respondents' brief, it is said:

"Counsel for plaintiff have ignored the controlling question which arose in the case at bar, namely: How can the exclusive control of Congress over such liability exist if a State may by authority of its local statutes impose a joint liability upon and authorize a single joint judgment against the interstate carriers and others as joint tort-feasors and provide for contribution between the co-defendants?"

The reply to this "controlling" question is simple. Congress did not in the employers' liability act prescribe the measure of damages. It did not prescribe a rule of liability, but left the rules of practice to the courts of the several forums and the measure of damages to the rules of the common law. Under the common law a round verdict was required. Whether the Georgia rule is derived from statute or the common law is immaterial. If from a statute it is immaterial, for the statute follows the common law. (Respondents cannot complain of the contribution feature because their principal criticism of the Doyle case (page 27 of their brief) is that it is not applicable to this case because juries in Minnesota courts were allowed to return verdicts in different amounts against the different defendants.) It may be of interest here to note that code of Georgia was prepared under the act of December 9th, 1858, which provided for commissioners to prepare for the people of Georgia a code which should "as nearly as practicable embrace in a condensed form the laws of Georgia, whether derived from the common law, the constitution, the statutes of the State, the decisions of the Supreme Court, or the statutes of England in force in this State."

It is a known fact that the commissioners in the exercise of their powers took the liberty of interpolating some of the provisions of the civil law and some of their views as to proper changes of the common law. This probably accounts

for the provision for contribution among tort-feasors, and the apportionment of verdicts in cases of trespass to land, as the sections in question were incorporated from the common law. (See *Simpson vs. Perry*, 9th Georgia, 508-509. *Chattahoochee Brick Co.*, 92 Georgia, 631.)

It is inconceivable that Congress could by the employers' liability act have intended to deprive an interstate employee of his common-law right to a round verdict or his common-law right to join master and servant as defendants. The act was destined to help an employee, not to injure him. It was intended to add to his rights, not to detract from them.

Why should the interstate master have rights superior to other masters? Why should this Court be asked to deny an interstate servant his common-law right to a round verdict when it sustained it as to the plaintiff in the case of *Washington Gas Light Co. vs. Lowden*, 172 U. S., 534-552? The answer is that Congress did not so intend.

In various parts of respondents' brief it is urged as against the right of joinder in this case that the rules of law applicable to the safety-appliance act and the law as to contributory negligence applied differently as between the two defendants. Replying, we say that if separate defences will defeat the right of joinder then the cases of *Powers vs. Chesapeake R. R.*, 169 U. S., 92; *Southern Ry. vs. Carson*, 194 U. S., 136, and the long line of decisions of this Court in accord therewith must be disregarded, for it has never been held that the fact that several wrongdoers had several defences deprived the injured party from suing them jointly. In the last-named case there was a defective safety appliance which cut off defences from the company which remained to the servants.

In respondents' brief some play is made upon the words "joint negligence." From the authorities, especially *Sherman & Redfield*, quoted on pages 7 and 8 of our brief, it is immaterial to the right of joinder whether the negligence is joint or concurrent, but it is well to note in passing that the

negligence in this case was both joint and concurrent. The act of the engineer caused injury. This was the act of both himself and the company, and while the company furnished a defective safety appliance, by the amendment, pages 8 and 9 of the record, it was shown that the engineer knew that petitioner was between the cars and that the coupling was defective.

The final and concluding argument of respondents is that in this case as a matter of practice the "decision of the highest court of the State that the defendants could not be sued jointly as tort-feasors in the said court is conclusive of the question."

Replying to this proposition, we have to say that the decisions cited on page 10 of our brief, together with the Miller case, cited on page 12 of our brief and accepted by this Court as the practice in Georgia, established the fact that under the Georgia practice such joinder has been adjudicated to be allowable. From the Georgia statute on page 10 of our brief it is shown that this rule of practice cannot be changed except by direct review, and the concurrence of the six justices. It follows from this that the Supreme Court of Georgia could not have intended to change the rule of practice, for it did not pretend to review its former decisions, and as only four justices participated in the decision it could not, as a physical fact, have had such effect. To say that the Supreme Court of Georgia bases its decision in this case upon a rule of practice of the courts of the State of Georgia is tantamount to saying that that Court set up a sham rule of practice as a sham to prevent this Court from reviewing its decisions. For its rule had been so well established that a decision contrary to this must have been a sham, and it is unthinkable that the justices of a court of the history and traditions of that high court could countenance a sham to avoid a review of its decision.

It is established by the case of *Southern Ry. vs. Miller*, 1 Georgia Appeals, 621, affirmed by this Court in 217 U. S.,

209, and adopted and followed by the Supreme Court of Georgia in *L. & N. vs. Roberts*, 136 U. S., 270, that a plaintiff may in one action join a master and servant wrongdoer where the liability of the one arises upon a State statute and the other upon the common law. Such being the settled rule of practice, how can it be said that the same rule does not apply when the cause of action arises under the Federal law? To say so discriminates against the servant having an action under the Federal statute. This the court below did, and this we say was error.

We submit that the Supreme Court of Georgia could not formulate a rule applicable alone to cases arising under the federal employers' act. That act leaves it to the State courts to enforce it under their rules of practice. It does not authorize these courts to establish a rule of practice peculiar to such actions alone. The courts must enforce the statute according to their established rules of practice, so if the courts below have sought to establish a rule of practice to meet its views as to this particular case the practice is discriminatory and an error and should be reversed.

Respectfully submitted,

W. W. OSBORN,
A. A. LAWRENCE,
Attorneys for Petitioner.